

Whistleblowing and the Protected Disclosure Act

Will union members be protected if they disclose unlawful or irregular conduct in companies or unions?

Stuart Harrison provides an overview of the Protected Disclosure Act (PDA), which seeks to protect employees.

Before the PDA, neither common nor statutory law made provision for procedures in terms of which employees in both the private and public sectors may disclose information regarding unlawful or irregular conduct by their employers or other fellow employees. The PDA states that criminal and other irregular conduct are detrimental to good, effective, accountable and transparent governance and it stipulates that every employer and employee has a responsibility to disclose criminal and other irregular conduct in the workplace. The PDA seeks to protect employees who make a disclosure

PROTECTING WHISTLEBLOWERS

A whistleblower will be protected if the employee has reason to believe that the information disclosed shows or tends to show:

- that a criminal offence has been committed or is likely to be committed;
- that the person has failed or is likely to fail to comply with any legal obligation;
- a miscarriage of justice;
- endangerment of health and safety;
- damage to the environment;
- unfair discrimination; or

- any of the above has been deliberately concealed.

Thereafter, for the disclosure to be a 'protected disclosure' it must be made to:

- a legal advisor in order to take legal advice;
- the employer, in which case it must be made in good faith and in line with the employer's procedure for whistleblowing (if any);
- a member of Cabinet or of an Executive Council of province (if the employer is State-related);
- the Public Protector or Auditor-General (for matters normally in their jurisdiction and where the employee reasonably believes the information to be substantially true).

If the disclosure is not made in line with the above procedure, it can still be protected but there are extra requirements. For example:

- reasonable belief that the information is substantially true;
- disclosure must not be made for personal gain;
- reasonable belief that will be subjected to detriment if disclose to employer;
- have disclosed to employer previously but no action taken within a reasonable period; and
- impropriety is of exceptionally serious nature.

The PDA prohibits an employer from subjecting the employee to any 'occupational detriment' as a consequence of making a protected disclosure. Detriment includes: disciplinary action, dismissal, suspension, demotion, harassment, intimidation, a transfer, refusal to promote, refusal of a reference, generally being adversely affected in employment or threatening any of the above.

REMEDIES FOR THE WHISTLEBLOWER

These include:

- approach the High/Labour Courts for an order seeking protection or can invoke any other process allowed for or prescribed by

law, for example an application of damages or a referral to the CCMA;

- proceedings for unfair dismissal;
- an occupational detriment is an unfair labour practice; and
- where an employee may be adversely affected, he must be transferred if reasonably possible and practical.

PITFALLS AND DEVELOPMENTS

Since the promulgation of the PDA, developments have revealed that:

- numerous disclosures made are not based in good faith;
- disclosures have increased level of corporate governance;
- employees place themselves at risk where disclosures made about persons with authority;
- legal remedies stated in the PDA are costly and can misfire;
- a period can ensue between the occupational detriment and the remedy becoming effective.
- employees often do not understand difference between conjecture, rumours and solid information; and
- confidentiality tends to be absent from the workplace.

CONCLUSION

Steps must be implemented by employers to further protect employees who whistleblow in good faith.

- Employer policies on the issue should be reviewed and developed in line with that objective.
- Employers must be given training on the PDA and how to whistleblow correctly.
- Directors and senior managers must embrace the PDA

LB

Harrison is an attorney with Sonnenberg Hoffmann and Galombik. This is an edited version of a presentation made at the IRASA conference in July 2004.